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IN THE SUPREME COURT
of the
STATE OF UTAH

UTAH SAND & GRAVEL PRODUCTS
CORPORATION, a corporation,

Plaintiff and Respondent,

vs.

JAY TOLBERT,

Defendant and Appellant

Case No.
10280

FEB 17 1963

APPELLANT'S BRIEF

Clerk, Supreme Court

Appeal from denial of Appellant's Motion to Declare
Judgment Void when summons was issued from the
Salt Lake City Court and judgment was taken in the
District Court of Salt Lake County.

MARCELLUS K. SNOW, *Judge*

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Appellant*

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Defendant and Appellant.

Case No.
10280

APPELLANT'S BRIEF

STATEMENT OF THE CASE

On the 17th day of October, 1964, the above named defendant and appellant was served with a Summons by H. Thomas, Constable of the Salt Lake City Precinct, Salt Lake County, State of Utah. The Summons was titled in the City Court of Salt Lake City, Salt Lake County, State of Utah, and the Summons further provided that a Complaint would be filed with the Clerk of the Court ten days after service of the Summons upon the defendant. The caption of the Summons was as follows:

IN THE CITY COURT OF SALT LAKE CITY
SALT LAKE COUNTY, STATE OF UTAH

The body of the Summons was in due form with this addition:

"This is an action on an open account with a balance due in the sum of \$20,984.66, for interest, for a reasonable attorney's fee, as provided therein, and for all costs of court."

Dated this day of October, 1964, A.D.
.....Defendant's Address: 2289 Saddleway, Ben-
nion, Utah

/s/ James L. Barker, Jr.

Subsequently, within the ten day period, a Complaint was filed in the Third Judicial District Court, in and for Salt Lake County, State of Utah. The caption of the Complaint was as follows:

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH

Said Complaint was in the simple form of a common count for goods, wares and merchandise and prayed for judgment in the amount of \$20,984.66. Subsequently, on the 22nd day of October, 1964, and without any notice to the defendant, an ex-parte Order was obtained in the District Court in which the plaintiff's attorney obtained the following Motion and Order:

COMES NOW attorney for plaintiff in the above entitled case and moves the Court for an Order permitting the amendment of the Court heading on the Summons served on defendant herein, by interlineation, to the effect that the heading should show In The Third Judicial District Court in and for Salt Lake County, State of Utah, rather than In the City Court of Salt Lake City, State of Utah; that no substantial right of the defendant herein would be affected by this interlineation; and further, that no notice is necessary in the above entitled motion. This Motion is based upon Rule 4 (h) of the Utah Rules of Civil Procedure.

DATED THIS 22 day of October, 1964.

/s/ James L. Barker, Jr.

ORDER

Upon reading the foregoing Motion of plaintiff to amend the Summons served upon defendant herein, it is hereby

ORDERED, ADJUDGED AND DECREED that the heading on said Summons may be corrected by interlineation to show "In The Third Judicial District Court in and for Salt Lake County, State of Utah" DATED this 22 day of October, 1964.

/s/ Marcellus K. Snow
Judge

On the basis of the foregoing, a Default Judgment was taken against Jay Tolbert in the amount of \$20,984.66 with interest at the rate of 6% from April 1, 1964, and for costs of Court. Said Judgment being taken on the 18th day of November, 1964.

On the 24th day of November, 1964, the defendant herein filed a special appearance and a Motion to have the Judgment Declared Void. This was subsequently argued before the Honorable Marcellus K. Snow on the 9th day of December, 1964, and the Court denied the defendant's Motion. The defendant promptly appealed to the above entitled Court.

RELIEF SOUGHT

To declare judgment void and require plaintiff to reserve defendant according to law.

STATEMENT OF FACTS

The facts of the case are set out in the Statement of the Case, it being undisputed that the defendant was served with a Summons titled in the City Court of Salt Lake City, Salt Lake County, State of Utah, which provided that a Complaint would be filed within ten (10) days. No Complaint was ever filed in the City Court of Salt Lake City, Salt Lake County, State of Utah, but that a Complaint was subsequently filed in the Third Judicial District Court of Salt Lake County, State of

Utah. The Motion filed by plaintiff's attorney provided that the defendant herein was not entitled to any notice of said interlineation in the heading of the summons to show the Third Judicial District Court in and for Salt Lake County rather than the City Court of Salt Lake City, it having been stated in said Motion that said Motion was based upon Rule 4 (h) of the Utah Rules of Civil Procedure. Based upon the plaintiff's Motion the Court entered an Order correcting the interlineation of the summons to show the Third Judicial District Court and for Salt Lake County, State of Utah. Based upon the Motion granting a substitution of courts the Default Judgment against the defendant was taken in the sum of \$20,984.66.

STATEMENT OF POINTS

The lower Court erred in overruling defendant's Motion to Declare Judgment Void because said Summons was entitled in the wrong Court, and a Summons which fails to state the time and place at which the defendant is required to appear and answer a Complaint filed against him is defective and void.

ARGUMENT

ARGUMENT: Point One. This particular matter has been before this Court and has been ruled upon and it has been stated with strong and affirmative language in the case of *Glassman vs. the District Court*, 80 Utah 1, 12 Pacific 2nd, 361.

“A service of Summons is void because it failed to state the time and place at which the defendant was required to appear and answer the Complaint filed.”

In *Wasatch Livestock Loan vs. The District Court*, 86 Utah, 422, 46 Pacific 2nd, 399, this Court voided the services of Summons because it did not state whether or not the Complaint had been filed in the Clerk's Office. See also *Farmer's Banking Company vs. Bullen*, 62 Utah 1, 217 Pacific 2nd, 969; *Winter vs. Hughes*, 3 Utah 443, 24 Pacific 2nd, 759. The foregoing cases have been reaffirmed in subsequent rulings in this Court, see *Thomas vs. District Court*, 110 Utah, 245.

In *Glassman vs. The District Court*, set forth in 80 Utah 1, 12 Pacific 2nd, 361, this Court has held that the proper name of the Court is necessary in order to give the Court jurisdiction and that the failure to properly name the Court and the place at which the defendant is required to appear is jurisdictional and that such a defect would render any judgment so obtained void.

ARGUMENT: Point Two. There is no dispute that the original Summons is titled in the City Court of Salt Lake City, Salt Lake County. There is no dispute that the judgment was taken in the Third Judicial District in and for Salt Lake County, State of Utah. There is no dispute that the Summons failed to state the time and place at which the defendant was to appear and

answer the Complaint filed against him. Should the Court hold that a person could be served in one court and a judgment taken in another, chaos would be created as far as the legal practice is concerned. If this were permitted a defense attorney would never know what court to apply to in order to obtain a copy of the Complaint which might be filed against his client. It is undisputed that the purpose of a Summons is to advise the defendant of the time and place at which he is required to appear and answer a Complaint, and if the summons is titled in the wrong court said defendant would be subject to untold abuses. In order to protect himself he would have to check every Court in the State of Utah.

Rule 4 (h) of the Utah Rules of Civil Procedure was never intended to permit a plaintiff to, by interlineation, change one court to another court, and thereby make a void Summons voidable. The purpose of this rule is to to permit amendment of minor defects or voidable defects, but it was never intended to make a void summons valid.

This Court having spoken on this very point and this very issue and the members of the Bar having been advised and appraised of the decisions of this Court, they are certainly entitled to rely on the previous cases and the previous decisions and so advise their clients. Should this Court permit attorneys to serve Summons in one court and take judgments in another, in light of the previous decisions which have been rendered in this Court, such attorneys would be given an unbearable burden. The

Court's attention is respectfully called to Rule 4 (h) which states that the Summons shall contain the name of the Court, the names and designations of the parties of the action, and the County in which it is brought. This very statute was interpreted in *Glassman vs. The District Court in and for Weber County*, 80 Utah 1, 12 Pacific 2nd, 361, which held that

"The failure of a Summons to inform the defendant of the Court where he must appear is insufficient to confer jurisdiction on his person; therefore, a Summons directing the defendant to appear in the District Court of Salt Lake County does not give the District Court of Weber County jurisdiction over the defendant's person."

CONCLUSION

It is submitted that it has always been the law in the State of Utah that the failure of a Summons to inform the defendant of the Court where he must appear is insufficient to confer jurisdiction on his person; therefore, the plaintiff in this case should be required to serve the defendant herein with a proper Summons and proceed with this action accordingly and that the plaintiff should not be permitted to serve the defendant with a City Court Summons and then take judgment against him in the District Court of Salt Lake County.

Respectfully submitted,

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